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February 8, 1988

Michael R. Deland  
Regional Administrator  
Environmental Protection Agency  
John F. Kennedy Bldg.  
Boston, MA 02203

Re: U.S. EPA Docket No. I-88-1001  
Administrative Order

Dear Mr. Deland:

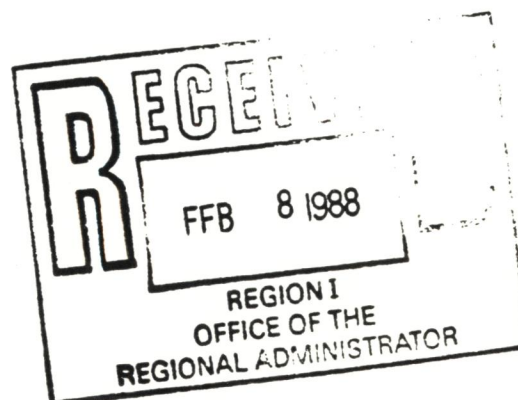
Enclosed please find Tamposi Family Investment's Petition for Reimbursement pursuant to 42 U.S.C. §9606(b), in conjunction with remedial work performed at the "Russell Avenue" site, Nashua, New Hampshire, under Administrative Order No. I-88-1001.

If you have any questions, please do not hesitate to call.

Very truly yours,

  
Elizabeth A. Ryan

EAR/kmc  
Enclosure  
cc: Celina Tamposi



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I

In the Matter Of:	)	
	)	
RUSSELL AVENUE SITE	)	
	)	
TAMPOSI FAMILY INVESTMENTS	)	
c/o The Tamposi Company, Inc.)	)	
402 Amherst Street	)	
Nashua, NH	)	U.S. EPA
	)	Docket No.
Petitioner	)	I-88-1001
	)	
Proceeding Under Section	)	
106(b) of the Comprehensive	)	
Environmental Response,	)	
Compensation and Liability	)	
Act of 1980, as amended by	)	
the Superfund Amendments	)	
and Reauthorization Act of	)	
1986, Pub. L. No. 99-499,	)	
100 Stat. 1613	)	
(October 17, 1986).	)	

PETITION FOR REIMBURSEMENT

I. JURISDICTION

1. On or about October 16, 1987 the United States Environmental Protection Agency (EPA), Region I, issued an Administrative Order For Removal Action ("Order") to Tamposi Family Investments pursuant to the authority vested in the President of the United States by Section 106(a) of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9606(a), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986). This authority was delegated to the Administrator of the United States

Environmental Protection Agency on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2926 (January 29, 1987) and further delegated to the Regional Administrator, EPA Region I, by EPA delegation No. 14-14-C.

2. Tamposi Family Investments complied with the terms of the Order by performing the required action.

3. Petitioner Tamposi Family Investments seeks reimbursement from the Hazardous Substance Superfund for its costs of response plus interest, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9606(b) (1987), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986). Petitioner asserts that it is not liable for response costs under 42 U.S.C. §9607(a) and that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant Order.

## II. FACTS

4. Petitioner Tamposi Family Investments is a partnership composed of various members of the Tamposi family.

5. Petitioner is the owner of the real property (the "site") which is located between Russell Avenue Extension and Lincoln Extension, Nashua, New Hampshire. The property is an undeveloped tract of land consisting of two parcels (lot 65 and a portion of lot 63 on Tax Map Number 7).

6. On or about March 1985, the State of New Hampshire discovered waste asbestos on the site. The EPA conducted a

preliminary investigation in October 1985 and a comprehensive site investigation in November 1985. Friable baghouse asbestos waste and friable asbestos sheeet scraps were discovered on the site, as well as pelletized asbestos waste intermixed with the soil.

7. The EPA notified the Petitioner of its potential liability pursuant to Section 104 of CERCLA, 42 U.S.C. 9604, by Notice Letter sent certified mail on March 17, 1987.

8. Subsequent meetings between EPA representatives and Petitioner resulted in the Petitioner's agreement to perform medial work pursuant to the issuance of an administrative order. *cause*

Petitioner retained Balsam Environmental Consultants, Inc.

("Balsam") to design and implement a remedial program at the site as outlined in the Balsam work plan titled "Asbestos Remediation Project Russell Avenue Site, Nashua, New Hampshire", dated September 18, 1987 and amended in Balsam's letter to Mr. Edward Conley of the EPA, Region I, dated October 29, 1987.

9. The Administrative Order dated October 6, 1987 specified that Petitioner retain a contractor to perform the work set forth in Balsam's work plan and to designate a coordinator for the work performed. The Order required the Petitioner to submit the results of all sampling or tests and all other data generated by Petitioner. Moreover, the Order required Petitioner to submit a post-monitoring plan and a complete written report after site work was completed, describing the response activities.

10. Pursuant to the Order, Balsam designed and implemented the work plan which included containment of asbestos material on



the property. The contractor that performed the work was Surewood Excavation, Inc. (Surewood) of Nashua, New Hampshire. Petitioner retained Maynard & Paquette, Inc. of Nashua, New Hampshire to perform design/engineering work.

11. On October 13, 1987, site activities commenced and were successfully completed on schedule. A post-activity survey indicated that areas containing asbestos on the site were adequately covered with soil to prevent migration of asbestos by surface water or air. Air monitoring documented the absence of detectable levels of asbestos fibers in the air at the site perimeter.

12. A final report titled "Asbestos Remediation Project, Post Remedial Report - Russell Avenue, Nashua, New Hampshire" dated December 11, 1987 was prepared by Balsam and forwarded to EPA, Region I. The report outlined the remedial process implemented by Balsam in accordance with the Administrative Order.

### III. PROPERTY BACKGROUND

13. From 1968 until 1983 Samuel Tamposi, Sr., was owner of the site. Petitioner believes that a Mr. Ken Spaulding owned the property until March 12, 1962 when it was deeded to Attorney Thomas Leonard, now deceased. Attorney Leonard deeded the property to Broad Acres, Inc., a New Hampshire corporation, in April 1963. Broad Acres, Inc. conveyed the property to Samuel Tamposi, Sr., in September 1968.

14. In 1983 Samuel Tamposi, Sr. gave the property free of all restrictions and conditions to Tamposi Family Investments, a partnership consisting of his children. Mr. Tamposi received no consideration for the transfer.

15. Samuel Tamposi, Sr., by affidavit sent to EPA Region I, has stated that he was not aware of asbestos disposed on the property until EPA involvement in 1985. (See attached copy of Affidavit of Samuel Tamposi, Sr., previously filed.) Since the EPA investigations, Petitioner has learned the Johns-Manville Corporation possibly used the site as a disposal area for asbestos material in the 1940's or 1950's.

16. At the time that Samuel Tamposi, Sr. acquired the property, he did not conduct an inspection for asbestos or hazardous substances. It was not the practice to conduct environmental site reviews in 1968 nor was it the practice at the time that the property was given to Petitioner in 1983.

17. Petitioner did not inspect the property in 1983 when the gift was received. None of the partners had any knowledge of asbestos disposal on the site until the EPA investigation in 1985. Prior to EPA involvement, the Petitioner intended to develop the property for residential use and had expended funds for development plans. (See attached copy of Affidavit of Celina Tamposi, previously submitted to EPA Region I).

#### IV. REIMBURSEMENT PURSUANT TO §9606(b)

18. Section 9606(b)2(A) of CERCLA provides for reimbursement from the Hazardous Substance Superfund for costs and interest

incurred in compliance with an Administrative Order. Subsection (c) requires that the Petitioner establish by a preponderance of the evidence that it is not liable for response costs under 42 U.S.C. §9607(a) and that the costs are reasonable.

19. The liability of owners or operators of facilities pursuant to 42 U.S.C. §9607(a) is subject to the limitations imposed by 42 U.S.C. §9607(b). According to subsection (b), there is no liability for an owner of a facility where the threat of release is caused solely by the act or omission of a third party other than one whose act or omission occurs in connection with a contractual relationship existing with the defendant. In the present case, the alleged threat in question was caused by third parties whose acts or omissions have no connection at all with the Petitioner (see paragraphs 13 - 17 above).

20. The Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986), amending CERCLA, defines the term "contractual relationship" to exclude instruments transferring title of real property under certain circumstances where the placement of hazardous substances on the property occurred before the conveyance. See 42 U.S.C. §9601(35)(A). Petitioner contends that this section is inapplicable where the contamination occurred while the property was in the hands of third parties and then conveyed to yet another third party before it came to be held by the current owner, in this case the Petitioner.

21. Even if 42 U.S.C. §9601 is applicable, this section precludes liability for the current owner. Section (35)(A)



provides that for after-acquired property, the defendant must establish one or more of the following circumstances by a preponderance of the circumstances:

- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
- (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
- (iii) The defendant acquired the facility by inheritance or bequest.

22. With respect to subsection (i), the Petitioner did not know and had no reason to know of the asbestos disposal at the time that they acquired the property. 42 U.S.C. §9601(35)(B) requires a defendant to show under subsection (i) that at time of acquisition all appropriate inquiry into the previous ownership and uses of the property was made consistent with good commercial or customary practice. In December of 1983 when Petitioner acquired the site by gift from Samuel Tamposi, Sr., it was not customary practice to investigate or inspect property for possible asbestos burial. Since the property was within the same family and conveyed to Petitioner by gift, arguably the date in 1968 when Samuel Tamposi, Sr. acquired the property is more relevant in determining the standard of care for investigation. Investigation of property for asbestos contamination was equally unheard of in 1968.

23. Subsection (iii) of 42 U.S.C. §9601(35)(B) creates another exception where the defendant acquired the property by



inheritance or bequest. This exception operates independently of the duty to investigate and inspect the property discussed above. Webster's Dictionary defines the term bequest broadly to include any formal assignment or conveyance including ,especially, an assignment or conveyance to successors or to posterity. See Webster's Third New International Dictionary (3rd ed. 1961). The gift of real property from a father to his children, such as occurred in this instance, falls within the exception in question.

24. Petitioner submits that the aforementioned facts and authority establish by a preponderance of the evidence that it is not liable for response costs under 42 U.S.C. §9607(a).

25. Petitioner submits that its costs incurred in compliance with the Order are reasonable. Attached hereto and incorporated herein are invoices from Maynard & Paquette, Inc., Engineers; Surewood Excavation, Contractors; Balsam Environmental Consultants, Inc.; and Devine, Millimet, Stahl & Branch, P.A., all of whom have provided services in this matter. The following is a breakdown of costs to date:

Water Bill, Mrs. Ravenelle	\$ 21.46
Maynard & Paquette, Inc.	\$ 6,501.99
Surewood Excavation	\$45,369.50
Balsam Environmental Consultants, Inc.	\$36,233.65
Devine, Millimet, Stahl & Branch	\$ 5,151.45
TOTAL TO DATE	<u>\$93,277.95</u>

26. It is anticipated that there will be additional legal expenses incurred in connection with this Petition.

27. WHEREFORE, Petitioner respectfully requests that it has met all requirements for reimbursement of its costs and interest pursuant to 42 U.S.C. §9606(b) as set forth above.

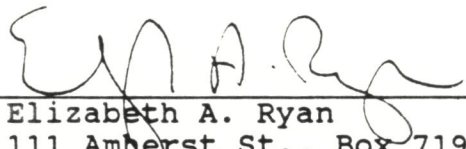
Respectfully submitted,

TAMPOSI FAMILY INVESTMENTS  
By Its Attorneys  
DEVINE, MILLIMET, STAHL & BRANCH  
PROFESSIONAL ASSOCIATION

DATE:

Feb. 8/1988

By

  
Elizabeth A. Ryan  
111 Amherst St., Box 719  
Manchester, NH 03105  
(603) 669-1000

AFFIDAVIT OF SAMUEL TAMPOSI, SR.

Samuel Tamposi, Sr., being duly sworn, deposes and says as follows:

1. From 1968 until 1983 I was the owner of property adjacent to Russell Avenue in Nashua, NH, which is the subject of possible asbestos removal action by the United States Environmental Protection Administration. In 1983 I gave this property to a partnership consisting of my children. I received absolutely no consideration for this transfer.
2. I was not aware of asbestos disposal on the property until representatives of the government made this known to members of my family. During the period that I owned the property, up to and including the date of transfer to my children, I was not aware of the possibility of asbestos deposit on the property. If I had been aware of asbestos being on the property, I would not have transferred the property to my children.
3. At the time that I acquired the property, I did not conduct an inspection for asbestos or hazardous substances. This would not have been the practice at the time. Further, it would not have been the practice at the time that the property was given to my children in 1983.
4. The gift to my children was free of all restrictions and conditions. Thereafter, I have had no control over the



disposition, development or use of the property.

The above statements are true to the best of my knowledge and belief.

Dated:

Oct 20, 1987 Samuel Tamposi, Sr.  
Samuel Tamposi, Sr.

STATE OF NEW HAMPSHIRE  
COUNTY OF HILLSBOROUGH

~~September~~ October

On ~~September~~ 20, 1987, the above Samuel Tamposi, Sr., appeared before me and made oath that the above statements were true to the best of his knowledge and belief.

Elaine R. Viafora  
Notary Public/~~Justice of the Peace~~

My commission expires:

ELAINE R. VIAFORA  
NOTARY PUBLIC STATE OF NEW HAMPSHIRE  
MY COMMISSION EXPIRES 2/28/90.

6190:AA1

AFFIDAVIT OF CELINA A. TAMPOSI

Celina A. Tamposi, being duly sworn, deposes and says as follows:

1. I am a partner in Tamposi Family Investment Properties, a partnership consisting of the children of Samuel Tamposi, Sr.
2. In 1983, Samuel Tamposi, Sr. gave the partnership the property adjacent to Russell Avenue in Nashua, NH, which is the subject of a possible removal action by the Environmental Protection Administration of the United States Government. Other property was also conveyed to the children by gift at that time.
3. No inspection of the property was undertaken by any of the partners at the time that the gift was received. None of the partners had any knowledge of asbestos disposal on the property until after the matter was brought to their attention by government representatives. At the time the property was received by gift, none of the partners were aware that there was a possibility of an asbestos deposit on that property.
4. Prior to the time that the government made the partnership aware of the asbestos situation on the property, the partnership was planning to develop the property for residential use. Plans had been made and preparations undertaken which involved a substantial expenditure

directed towards ultimate development of the property. The partnership would not have done this or expended the money involved if it was aware of any problems with possible asbestos contamination which could prevent development of the property.

5. The partnership has attempted to cooperate with the government at all times with regard to the property in question. They have made the property available for inspection and have generally complied with government requests and instructions regarding the property.

The above statements are true to the best of my knowledge and belief.

Dated:

Oct. 20, 1987

Celina A. Tamposi  
Celina A. Tamposi

STATE OF NEW HAMPSHIRE  
COUNTY OF HILLSBOROUGH

On ~~September~~ <sup>October</sup> 20, 1987, the above Celina A. Tamposi appeared before me and made oath that the above statements were true to the best of her knowledge and belief.

Eugene R. Vafora  
Notary Public/Justice of the Peace

My commission expires:

EUGENE R. VAFORA  
NOTARY PUBLIC STATE OF NEW HAMPSHIRE  
MY COMMISSION EXPIRES 8/25/90